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Supreme Court, U.S.
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No. 02-102

In The

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,

Petitioners,

v.

STATE OF TEXAS,

Respondent.

On Writ Of Certiorari To The Texas Court Of Appeals For The Fourteenth District

RESPONDENT'S BRIEF

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QUESTIONS PRESENTED

1. Whether the petitioners' criminal prosecutions for the offense of engaging in homosexual conduct, as defined by section 21.06 of the Texas Penal Code, violated the Fourteenth Amendment guarantee of equal protection of the law.

2. Whether the petitioners' criminal prosecutions under section 21.06 of the Texas Penal Code violated their constitutional rights to liberty and privacy, as protected by the Due Process Clause of the Fourteenth Amendment.

3. Whether *Bowers v. Hardwick*, 478 U.S. 186 (1986), should be overruled.

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Romer v. Evans, 517 U.S. 620 (1996) .....*passim*

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OTHER AUTHORITIES

Baker, Lynn A., *The Missing Pages of the Majority Opinion in Romer v. Evans*, 68 U. Colo. L. Rev. 387 (1997).....46

Editors of the Harvard Law Review, *Sexual Orientation and the Law* (Harvard University Press 1990).....35

Eskridge, William N. Jr., *Gaylaw: Challenging the Apartheid of the Closet* 229 (1999).....13, 19, 46

TABLE OF AUTHORITIES – Continued

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Friedman, Lawrence M., *Crime and Punishment in American History* 13 (1993) 20

Green, Richard, *Griswold's Legacy: Fornication and Adultery as Crimes*, 16 Ohio N.U.L. Rev. (1989) 19, 20

Grey, Thomas C., *Bowers v. Hardwick Diminished*, 68 U. Colo. L. Rev. 373 (1997) 46

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McConnell, Michael, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 Yale L. Rev. 1501 (1989) 48

Stratton, Tracy Shallettor, *No More Messing Around: Substantive Due Process Challenges to State Laws Prohibiting Fornication*, 73 Wash. L. Rev. 767 (1998) 19

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STATEMENT

A citizen informed Harris County sheriff's deputies that an armed man was "going crazy" in the apartment of petitioner Lawrence. Pet. App. 129a. The investigating officers entered the apartment and observed the petitioners engaged in anal sexual intercourse. *Id.* They were then charged by complaint in a Harris County justice court with the commission of the Class C misdemeanor offense of engaging in homosexual conduct, an offense defined by TEX. PENAL CODE § 21.06(a) (Vernon 1994), as follows: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."[1] A Class C misdemeanor is punishable only by a fine not to exceed five hundred dollars. TEX. PENAL CODE § 12.23 (Vernon 1994).

After the petitioners were convicted and fined in the justice court,[2] they gave notice of appeal and the proceedings were transferred to Harris County Criminal Court at Law No. 10.[3] The petitioners moved to quash the complaints on various constitutional grounds. Pet. App. 117a, 130a. In support of those motions, the petitioners offered into evidence only the complaints themselves and the supporting "probable cause affidavits" filed by a sheriff's deputy in the justice court. *See* Pet. App. 129a, 141a. The two affidavits contained identical descriptions of the events leading to the filing of the complaints:

---

[1] The term "deviate sexual intercourse" is defined in the Texas Penal Code as "any contact between any part of the genitals of one person and the mouth of or anus of another person," or "the penetration of the genitals or the anus of another person with an object." TEX. PENAL CODE § 21.01(1) (Vernon 1994).

[2] The record contains no information concerning the course of proceedings which occurred in the justice court.

[3] An appeal from a judgment of conviction in a Texas justice court results in a trial de novo in a county court. TEX. CODE CRIM. PROC. art. 45.042 (Vernon Supp. 2003).

> Officers dispatched to 794 Normandy # 833 reference to a weapons disturbance. The reportee advised dispatch a black male was going crazy in the apartment and he was armed with a gun.
>
> Officers met with the reportee who directed officers to the upstairs apartment. Upon entering the apartment and conducting a search for the armed suspect, officers observed the defendant engaged in deviate sexual conduct namely, anal sex, with another man.

After the county court denied the petitioners' motions to quash the complaints, they entered pleas of *nolo contendere*, and the court found them guilty of engaging in homosexual conduct. The court sentenced each petitioner, pursuant to a plea bargain, to payment of a fine in the amount of two hundred dollars, and the petitioners again gave notice of appeal from their convictions.[4]

A three-judge panel of the Court of Appeals for the Fourteenth District of Texas initially held that the State's prosecution of the petitioners under section 21.06 violated the Equal Rights Amendment of the Texas Constitution,[5] with one justice dissenting. The State's motion for rehearing *en banc* was granted, however, and on March 15, 2001, the *en banc* court of appeals rejected all of the petitioners' constitutional challenges to the enforcement of section 21.06. *See Lawrence v. State*, 41 S.W.3d 349 (Tex. App.–Houston [14th Dist.] 2001, pet. ref'd) (Pet. App. 4a, *et seq.*). The *en banc* opinion of the court of appeals may be briefly summarized as follows:

[4] A case which has been appealed from a Texas justice court to a county court may be further appealed to a court of appeals if the fine exceeds $100 or the sole issue is the constitutionality of the statute on which the conviction is based. TEX. CODE CRIM. PROC. art. 4.03 (Vernon Supp. 2003).

[5] TEX. CONST. art. I, § 3a.

1. Enforcement of the statute prohibiting homosexual conduct does not violate the Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and Article I, § 3, of the Texas Constitution, because the statute does not implicate fundamental rights or a suspect class, and it has a rational basis in the Texas Legislature's determination that homosexual sodomy is immoral. The fact that heterosexual sodomy is no longer a criminal offense under Texas law is not constitutionally significant, because the Legislature could rationally distinguish between an act performed with a person of the same sex and a similar act performed with a person of different sex. Pet. App. 13a-18a.

2. Enforcement of section 21.06 does not violate the Equal Rights Amendment of the Texas Constitution, because the statute applies equally to both men and women who engage in the prohibited conduct, and it is not the product of prejudice towards persons of either gender. Pet. App. 20a-24a.

3. The State's prosecution of the petitioners for the offense of engaging in homosexual conduct did not violate any constitutional right to privacy under the State or Federal Constitutions, in light of the long history of the imposition of criminal sanctions for such conduct, because it could not be said that the State of Texas or the United States recognized any "fundamental right" to engage in homosexual activity. Pet. App. 25a-31a.

A petition for discretionary review was denied, without written opinion, by the Texas Court of Criminal Appeals. Pet. App. 1a.

SUMMARY OF ARGUMENT

1. The record is inadequate to serve as a basis for recognition of a limited constitutional right to engage in extramarital sexual conduct, because the absence of information concerning the petitioners and the circumstances of their offense precludes a determination of whether they would actually benefit from the Court's recognition of the limited right which they assert. The record is also inadequate to establish that the petitioners belong to the class for which they seek equal protection relief.

2. The States of the Union have historically prohibited a wide variety of extramarital sexual conduct, a legal tradition which is utterly inconsistent with any recognition, at this point in time, of a constitutionally protected liberty interest in engaging in any form of sexual conduct with whomever one chooses. Nothing in this Court's "substantive due process" jurisprudence supports recognition of a constitutional right to engage in sexual misconduct outside the venerable institution of marriage. This Court should adhere to its previous holding on this issue in *Bowers v. Hardwick*, 478 U.S. 186 (1986), and it should reaffirm that the personal liberties protected by the Due Process Clause of the Fourteenth Amendment from State regulation are limited to those "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

3. Since enforcement of the homosexual conduct statute does not interfere with the exercise of a fundamental right, and the statute is not based upon a suspect classification, it must only be rationally related to a permissible state goal in order to withstand equal protection challenge. This legislative proscription of one form of extramarital sexual misconduct is in keeping with long-standing national tradition, and bears a rational relationship to the worthy governmental goals of implementation of public morality and promotion of family values.

4. The petitioners cannot meet their burden of establishing a discriminatory purpose to the original enactment of a statute which is facially applicable to both persons of exclusively homosexual orientation and persons who regard themselves as bisexual or heterosexual. When the statute is viewed in historical perspective, it can reasonably be inferred that the Texas Legislature acted with non-discriminatory intent in limiting the scope of the predecessor sodomy statute to fit within the commonly understood parameters of this Court's then-emerging privacy jurisprudence.

ARGUMENT

I. Substantive Due Process Under The Fourteenth Amendment.

A. The appellate record is inadequate to support the recognition of the limited constitutional right asserted by the petitioners.

The appellate record does not establish that the petitioners would actually benefit from recognition of the particular liberty interest which they assert; therefore, it does not provide this Court with a factual basis for recognizing that interest.

Precise identification of an asserted liberty interest is critical to the determination of whether it falls within the scope of the Due Process Clause of the Fourteenth Amendment. An appellate court's substantive due process analysis "must begin with a careful description of the asserted right," because the "doctrine of judicial self-restraint" requires a court "to exercise the utmost care whenever [it] is asked to break new ground in this field." *Reno v. Flores*, 507 U.S. 292, 302 (1993) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

The petitioners initially advocate the recognition of a broadly drawn constitutional right to choose to engage in any "private consensual sexual intimacy with another

adult, including one of the same sex." Brief of Petitioners 10. However, the petitioners later clarify that their challenge does not extend to the validity of statutes prohibiting prostitution, incest or adultery, which they describe as implicating additional "state concerns" not present in this case. *Id.* at 22 n.16. In short, the petitioners are asking the Court to recognize a fundamental right of an adult to engage in private, non-commercial, consensual sex with an unrelated, unmarried adult.

The slim record reveals only that the petitioners are adult males and that they engaged in anal intercourse in an apartment that petitioner Lawrence identified as his residence. It does not answer any of the following questions concerning the factual basis of their constitutional claims:

- Whether the petitioners' sexual conduct was non-commercial.[6]
- Whether the petitioners' sexual conduct was mutually consensual.[7]
- Whether the petitioners' conduct was "private."[8]

[6] The lack of profit motivation cannot be inferred from the lack of prosecution for the more serious offense of prostitution, *see* TEX. PENAL CODE § 43.02 (Vernon Supp. 2003), because the police could not possibly determine whether prostitution was occurring if both participants in the sexual conduct declined to discuss that issue.

[7] While neither of the petitioners was charged with any variant of sexual assault, prosecution for such an offense would require an acknowledgment from at least one of the parties that the sexual activity was non-consensual. Because there are any number of reasons why a person might choose not to cooperate with authorities in the investigation and prosecution of a sexual offense, mutual consent cannot necessarily be inferred from the parties' silence.

[8] While the record reflects that the sexual conduct occurred in Lawrence's apartment, the record does not indicate whether anyone else was present in that apartment at the time. Lower courts have held that any right of privacy that protects marital sex from governmental interference is waived when an onlooker is welcomed into the marital

(Continued on following page)

- Whether the petitioners are related to one another.
- Whether either of the petitioners is married.
- Whether either (or both) of the petitioners is exclusively homosexual.[9]

While the petitioners possess standing to challenge the constitutionality of a statute under which they have actually been prosecuted and convicted, *see Eisenstadt v. Baird*, 405 U.S. 438, 443-444 (1972), they should not be permitted to argue that a protected liberty interest exists under some specified set of circumstances without showing that those circumstances actually exist. This Court will not issue an opinion "advising what the law would be upon a hypothetical state of facts," and it will not "decide questions that cannot affect the rights of litigants in the case before [it]." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (citations omitted). For example, in cases not involving expressive activity protected by the First Amendment, litigants have no standing to argue that a statute "would be unconstitutional if applied to third parties in hypothetical situations." *County Court of Ulster County v. Allen*, 442 U.S. 140, 155 (1979).[10]

bedchamber. *See Lovisi v. Slayton*, 539 F.2d 349, 351-352 (4th Cir. 1976), *cert. denied*, 429 U.S. 977 (1977).

[9] The sexual orientation of the petitioners appears to be irrelevant to the disposition of their substantive due process argument, because they assert a constitutional right to engage in sodomy with persons of either gender, but it may be significant in determining whether the petitioners are members of any specific class in addressing their arguments premised upon the Equal Protection Clause, *infra*.

[10] Thus, in *United States v. Lemons*, 697 F.2d 832, 834-835 (9th Cir. 1983), in which the defendant was convicted of engaging in homosexual sodomy in violation of an Arkansas statute, the court of appeals held that the defendant would not be heard to argue that the statute would be unconstitutional if applied to persons who committed sodomy in a private place, in light of the fact that the defendant was arrested while engaging in an act of oral sex in a public place, *i.e.*, the restroom of a national park.

In recognizing constitutional liberty interests under the Fourteenth Amendment, appellate courts "must use considerable restraint, including careful adherence to the incremental instruction given by the precise facts of particular cases, as they seek to give further and more precise definition to the right." *Troxel v. Granville*, 530 U.S. 57, 95-96 (2000) (Kennedy, J., dissenting).

Simply put, the record in this case provides an insufficient foundation for the meaningful review of the important and complex question of whether there is a constitutional right to engage in private, non-commercial, consensual sex with an unrelated, unmarried adult. At best, the record would support only the recognition of an extremely broad right to engage in sexual conduct with any other adult, regardless of any other circumstance which might attend that conduct – a right so broad that the petitioners themselves disavow any claim to it.

Because the record is inadequate to permit this Court to scrutinize and identify the contours and limitations of any protected liberty interest that might be recognized in this case, the State respectfully suggests that this Court dismiss the petition for writ of certiorari as improvidently granted. In the alternative, the respondent asks that the Court affirm the judgment of the Texas court of appeals on ground that the record is inadequate to support an effort to identify a limited constitutional right to engage in sexual conduct.

B. The Court has adopted an historical approach to the recognition of liberty interests protected under the Due Process Clause.

In addressing claims that a state has interfered with an individual's exercise of a previously unrecognized liberty interest protected by the Fourteenth Amendment, this Court has looked to the nation's history and legal traditions to determine whether the asserted interest is

actually so fundamental to our system of ordered liberty as to merit constitutional protection from state regulation. For instance, in *Moore v. City of East Cleveland*, 431 U.S. 494 (1976) (plurality opinion), the Court observed that, "Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teaching of history [and], solid recognition of the basic values that underlie our society'." *Id.* at 503 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)). Thus the "Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Id.*

In *Bowers*, 478 U.S. at 192-194, the Court rejected an asserted fundamental right to engage in homosexual conduct because, in light of pervasive State criminalization of such conduct throughout the nation's history, it could not seriously be asserted that a right to engage in homosexual sodomy was "deeply rooted in this Nation's history and tradition." Three years later, in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion), the Court noted that in its attempts to "limit and guide interpretation of the [Due Process] Clause," it has "insisted not merely that the interest denominated as a 'liberty' be 'fundamental' (a concept that in isolation is hard to objectify), but also that it be an interest traditionally protected by our society." *Id.* at 122-123.

Two of the opinions issued in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), expressed doubt or disagreement that the Due Process Clause protects only those practices, "defined at the most specific level," which were protected by law at the time of ratification of the Fourteenth Amendment.[11] Emphasis upon the

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[11] *See Casey*, 505 U.S. at 847 (joint opinion of O'Connor, J., Kennedy, J., and Souter, J.); *id.* at 923 (Blackmun, J., concurring).

nation's legal traditions appeared only in the dissenting opinions.[12] However, less than a year later, the Court's opinion in *Reno v. Flores*, 507 U.S. 292 (1993), unambiguously stated that the "mere novelty" of a claimed constitutional liberty interest was "reason enough to doubt that 'substantive due process' sustains it," because it could not be considered "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 303 (quoting *United States v. Salerno*, 481 U.S. 739, 751 (1987), and *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

This issue of the importance of national legal tradition in substantive due process jurisprudence was resolved in *Washington v. Glucksberg*, 521 U.S. 702 (1997), in which the Court emphasized the necessity of "examining our Nation's history, legal traditions, and practices" in order to determine whether a claimed liberty interest was, "objectively, 'deeply rooted in this Nation's history and tradition'" and "implicit in the concept of ordered liberty," and, therefore, merited protection under the Fourteenth Amendment:

> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," [*Moore v. City of East Cleveland*], at 503 (plurality opinion); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v.*

[12] *See Casey*, 505 U.S. at 952-953 (Rehnquist, C.J., dissenting); *id.* at 980 (Scalia, J., dissenting).

> *Connecticut*, 302 U.S. 319, 325, 326 (1937). Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. *Flores, supra*, at 302; *Collins* [*v. Harker Heights*, 503 U.S. 115 (1992)] at 125; *Cruzan* [*v. Director, Missouri Department of Health*, 497 U.S. 261 (1990)] at 277-278. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," *Collins, supra*, at 125, that direct and restrain our exposition of the Due Process Clause.

521 U.S. at 720-721.

The Court declined to recognize the constitutional liberty interest proposed in *Glucksberg* – a right to assisted suicide – because its recognition would have required the Court to "reverse centuries of legal doctrine and practice" and to elevate to the status of a protected liberty interest a practice that was traditionally prohibited by state law. *Id.* at 723, 728. In addition to the opinion of the Court, Justice Stevens in a concurring opinion agreed that "[h]istory and tradition provide ample support for refusing to recognize an open-ended constitutional right to commit suicide." *Id.* at 740 (Stevens, J., concurring).[13]

Since *Glucksberg* was decided, the Court has had little opportunity to consider the recognition of previously unacknowledged liberty interests under the Due Process

[13] The "traditionalistic approach" adopted by the Court in *Glucksberg* has been described as "wise, workable, and firmly grounded in principles of American constitutionalism," in that it "provides a check against particular states or local jurisdictions whose practices contradict what most Americans would deem to be fundamental rights, but does so without licensing courts to second-guess democratic judgments on the basis of their own ideological or philosophical preferences." Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 Utah L. Rev. 665, 681 (1997).

Clause.[14] In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the Court held that a determination of whether executive action violated an individual's right to substantive due process did not require the same historical and traditional analysis utilized in reviewing legislative action. A concurring justice suggested that "history and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry," leaving room for an "objective assessment of the necessities of law enforcement"; but that opinion did not suggest that *Glucksberg* was incorrect in its emphasis upon American legal tradition in determining the existence of a substantive due process right in the context of review of a legislative enactment. *Id.* at 857-858 (Kennedy, J., concurring). A subsequent statement in the same concurring opinion that "objective considerations, including history and precedent, are the controlling principle, regardless of whether the State's action is legislative or executive in character," *id.* at 858 (Kennedy, J., concurring), indicated no disagreement with the basic principle expressed in *Glucksberg*: that recognition of protected liberty interests under the Fourteenth Amendment must be based upon objective historical evidence that a particular practice is a cherished American tradition, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of [the] Court." *Glucksberg*, 521 U.S. at 720.

[14] The Court's opinions in *City of Chicago v. Morales*, 527 U.S. 41 (1999), and *Troxel v. Granville*, 530 U.S. 57 (2000), both included acknowledgement of the existence of substantive rights under the Due Process Clause, but in each of those cases the particular liberty interest in question had long been recognized by the Court: the freedom to loiter in a public place, *see Morales*, 527 U.S. at 53-54; and parents' liberty interest in the care, custody and control of their own children, *see Troxel*, 530 U.S. at 65-66.

C. This nation has no deep-rooted tradition of protecting a right to engage in sodomy.

Turning to the question of whether a right to engage in sodomy is "so rooted in the traditions and conscience of our people as to be ranked as fundamental," the Court's previous resolution of that issue in *Bowers v. Hardwick* is unassailable. As noted in *Bowers*, sodomy was a serious criminal offense at common law;[15] it was forbidden by the laws of the original thirteen states at the time of the ratification of the Bill of Rights; and it was punishable as a crime in all but five of the thirty-seven states in existence at the time of the ratification of the Fourteenth Amendment. *Bowers*, 478 U.S. at 192-193.

As further noted in *Bowers*, sodomy remained punishable as a crime in every state of the Union prior to the year 1961, *id.* at 193, when Illinois became the first state to adopt the American Law Institute's Model Penal Code approach to decriminalization of some sexual offenses. *Id.* at 193 n.7.

Our nation's history has not been rewritten in the seventeen years since *Bowers* was decided, and that history contradicts any assertion that a right to engage in homosexual anal intercourse has been a valued and protected right of American citizens. The fact that the states have traditionally prohibited the act as a crime is utterly inconsistent with any claim that our legal tradition has treated the choice to engage in that act as a "fundamental" right.

It is true that some change has occurred since *Bowers* was decided: three more states and the District of Columbia, in appropriate exercise of the democratic process, have repealed or limited the scope of their statutes prohibiting sodomy in general or homosexual sodomy in particular;

[15] *See also* William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 157 (1999).

and a small number of state appellate courts have found that such statutes violate a state constitutional right to privacy. *See* Brief of Petitioners 23 n.17. The State of Texas is now one of thirteen states in which consensual homosexual sodomy remains a criminal offense. *Id.* at 27 n.21. The fact that several states have ceased treating sodomy as a criminal offense, however, is no evidence of a national tradition of espousing, honoring or safeguarding a right to engage in deviate sexual intercourse.

The petitioners concede that this Court requires "objective guideposts," such as "history and precedent," in the process of identification of liberty interests protected by the Fourteenth Amendment. They point to the gradual trend towards decriminalization of consensual sexual behavior among adults as the necessary objective evidence of a fundamental right firmly rooted in the traditions and conscience of American citizens. *See* Brief of Petitioners 19-25. Four decades of gradual but incomplete decriminalization does not erase a history of one hundred and fifty years of universal reprobation. A recent trend towards uneasy toleration – even a trend involving a majority of the fifty states – cannot establish a tradition "deeply rooted" in our national history and tradition. The petitioners mistake new growth for deep roots.

The petitioners argue that the "consistency of the direction of change" indicates a national consensus sufficient to satisfy the need for objective indicia in identifying a constitutionally protected liberty interest, utilizing a key phrase from the Court's recent decision in *Atkins v. Virginia*, 122 S.Ct. 2242, 2249 (2002), in which the Court found that the execution of mentally retarded criminal defendants violated the Eighth Amendment.

The petitioners' argument suffers from a logical flaw in that, prior to 1961, every State treated sodomy as a criminal offense, so only one direction of change is possible. *Compare Atkins,* 122 S.Ct. at 2263 (Scalia, J., dissenting). A State's affirmative choice to maintain the status quo demonstrates the *absence* of consensus. Several states

have made such a choice, in that their appellate courts have upheld the constitutionality of statutes prohibiting the commission of sodomy or homosexual conduct. For instance, the Louisiana Supreme Court held in *State v. Smith*, 766 So.2d 501, 508-510 (La. 2000), that the constitutional right to privacy expressly recognized by that state's constitution did not extend to the commission of oral or anal sex in private, observing that there "has never been any doubt that the legislature, in the exercise of its police power, has the authority to criminalize the commission of acts which, without regard to the infliction of any other injury, are considered immoral."[16] *Accord Missouri v. Walsh*, 713 S.W.2d 508 (Mo. 1986) (holding that a prosecution under the Missouri homosexual conduct statute did not violate any constitutional right to privacy under the state or federal constitution). Should just a few more states join Texas, Louisiana and Missouri in upholding the state's power to punish acts of sodomy, one could argue that the prevailing trend was actually the rejection of a constitutional privacy right extending to consensual sodomy.

In any event, currently evolving standards are an unstable basis for recognition of fundamental rights protected by the Fourteenth Amendment. The Eighth Amendment has long been construed to require consideration of "evolving standards of decency that mark the

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[16] The Louisiana court also held that the separation of powers provision of its state constitution precluded the Court from usurping the legislative function of determining "the public policy of Louisiana on the practice of oral and anal sex"; and it pungently observed that the "only perceptible unconstitutionality in this case is that which would be evident if this court would . . . elevate [its] own personal notions of individual liberty over the collective wisdom of the voters' elected representatives' belief" that the proscription of "oral and anal sex, consensual or otherwise, is in furtherance of the moral welfare of the public mind." *Smith*, 766 So.2d at 510.

progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958), permitting reliance upon "contemporary values" as evidenced by recent legislative enactments. *See Penry v. Lynaugh*, 492 U.S. 302, 331 (1989). In contrast, none of this Court's precedents so much as suggests that recent legislative activity should be accepted as proof of "deeply rooted" fundamental rights, and the Court's decisions exploring the possible existence of unrecognized liberty interests under the Fourteenth Amendment have never taken into account rapidly "evolving standards." The approach advocated by the petitioners would require this Court to serve as a micro-managing super-legislature, continually assessing current legislative trends to determine the current extent of protection under the Fourteenth Amendment – an approach which is entirely inconsistent with the Court's reliance in *Glucksberg* upon history and legal tradition.

The petitioners also argue that previously recognized "fundamental interests . . . converge in the right asserted here," Brief of Petitioners 11-16, but considered separately, the recognized liberty interests upon which the petitioners rely do not implicate the conduct in question, and no logical process extends their reach when they are lumped together.

The petitioners first assert a constitutionally protected right to choose to enter into "intimate relationships," citing *Roberts v. United States Jaycees*, 468 U.S. 609, 617-618 (1984), but no court has held that this nebulously defined right extended to the protection of sexual misconduct prohibited by State law. For example, in *Marcum v. McWhorter*, 308 F.3d 635, 641-643 (6th Cir. 2002), the court held that the freedom to choose to enter into personal relationships could not extend to an adulterous relationship, since adultery has been punishable as a crime for centuries. In this case, while the petitioners may have a constitutional right to associate with one another, the right to form an "intimate relationship" does not

protect any and all sexual conduct in which they might engage in the context of that relationship.[17]

The petitioners also rely upon the recognized constitutional right to "bodily integrity," but the Court's decisions regarding bodily integrity generally pertain to unwarranted government invasion of an individual's body, and the individual's right to control his own medical treatment, *see Glucksberg*, 521 U.S. at 777-778 (Souter, J., concurring), and those decisions have nothing to do with the manner in which an individual interacts with third parties or invades another person's body.

The right to privacy in the home has long been recognized under both the First Amendment, *see Stanley v. Georgia*, 394 U.S. 557, 564-565 (1969), and the Fourth Amendment, *see Kyllo v. United States*, 533 U.S. 27, 31 (2001). However, the decision in *Stanley* involved the individual's freedom of thought, rather than conduct, *Stanley*, 394 U.S. at 565-566, and that decision has never been extended to prohibit state regulation of conduct that does not involve expression protected by the First Amendment. The Fourth Amendment protects against unreasonable police entry and search of the home, but it has never been found to protect one from prosecution for otherwise criminal conduct that occurs within that home.[18] *See Osborne v. Ohio*, 495 U.S. 103, 108-110 (1990); *Bowers*, 478 U.S. at 195-196; *Stanley*, 394 U.S. at 568 n.11.

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[17] Parents might well have a constitutionally protected right to maintain an intimate relationship with their children, but no one would argue that their protected liberty interest would extend to having sexual relations with the children.

[18] The petitioners understandably disavow any complaint regarding the manner in which the police entered Lawrence's apartment, Brief of Petitioners 14-15, since few citizens would want to impede an officer's ability to enter their residence to search for an armed man said to be "going crazy" on the premises. Pet. App. 129a.

By arguing that their asserted liberty interest under the Fourteenth Amendment may be located at the "convergence" of these previously recognized rights, the petitioners implicitly admit that none of them, standing alone, has ever been construed in a fashion that would protect an individual from state prosecution for sexual misconduct occurring in a private residence. The petitioners' assertion of a patchwork of constitutional rights which do *not* implicate their conduct does not logically prove that the conduct is in fact protected by a previously unrecognized liberty interest.

D. No tradition of protection exists at any level of specificity of designation of an asserted liberty interest.

The petitioners' other quarrel with *Bowers* involves the level of specificity at which the nation's traditions are to be analyzed in assessing the existence of a protected liberty interest under the Fourteenth Amendment, an issue that does not seem to have been definitively resolved at this time. *See Michael H.*, 491 U.S. 110, 127 n.6 (plurality opinion), 132 (O'Connor, J., concurring); *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998).[19] Assuming that issue does remain open at this time, it should not be necessary to resolve it in this case, since the petitioners cannot establish a historical tradition of exalting and protecting the conduct for which they were prosecuted at *any* level of specificity.

[19] The opinion in *Lewis* noted: "*Glucksberg* presented a disagreement about the significance of historical examples of protected liberty in determining whether a given statute could be judged to contravene the Fourteenth Amendment. The differences of opinion turned on the issues of how much history indicating recognition of the asserted right, viewed at what level of specificity, is necessary to support the finding of a substantive due process right entitled to prevail over state legislation." *Id.*

At the most specific level, the nation has a long-standing tradition, only recently waning, of criminalizing anal sodomy – the offense once known as "buggery" – as a serious criminal offense. *See Bowers*, 478 U.S. 192-194; William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 157-158, 328-337 (App. A) (1999).[20]

But even if the topic is broadened to include other acts of extramarital sexual intercourse, such as fornication, adultery, incest, prostitution, etc., the nation's tradition is still one characterized by prohibition and criminalization. Most of the states have maintained, through most of their history, statutes which made it a criminal offense to engage in fornication and adultery as well as sodomy, and there is no long-standing tradition of protecting the right to engage in any sort of extramarital sexual conduct.

Fornication was a punishable offense in colonial times, and it remained illegal in forty states until the early 1970s. *See* Tracy Shallbettor Stratton, *No More Messing Around: Substantive Due Process Challenges to State Laws Prohibiting Fornication*, 73 Wash. L. Rev. 767, 780 (1998). As of 1998, it was still a crime in thirteen states and the District of Columbia. *See id.* at 767 n.2; *accord*, Richard Green, *Griswold's Legacy: Fornication and Adultery as Crimes*, 16 Ohio N.U.L. Rev. 545, 546 n.8 (1989).

Adultery was once a capital offense, under some circumstances, in colonial Massachusetts, and it was

[20] While acknowledging the widespread and longstanding existence of sodomy statutes, Professor Eskridge is critical of the historical basis for the Court's decision in *Bowers*, on grounds that early sodomy statutes were aimed primarily at the prohibition of buggery and similar forms of unnatural coitus, rather than the oral sex act for which the defendant in *Bowers* was prosecuted. *See* Eskridge at 156-157. That concern is absent in this case, since it is undisputed that the act of anal sodomy was a serious crime – originally a capital offense – from the earliest days of the colonization period.

punished as a crime during the colonial period in almost every jurisdiction. *See Oliverson v. West Valley City*, 875 F. Supp. 1465, 1474 (D. Utah 1995). Adultery was still punishable as a crime "in most states . . . in 1900," *see id.* (quoting Lawrence M. Friedman, *Crime and Punishment in American History* 13 (1993)), and as of 1996, it remained a crime in twenty-five states and the District of Columbia. *City of Sherman v. Henry*, 928 S.W.2d 464, 470 n.3 (Tex. 1996); Green, *supra* at n.7.

Thus, the legislatures of the various states have shown significant concern for the sexual morality of the citizenry, and statutes criminalizing extramarital sexual conduct have been pervasive throughout our national history. The constitutionality of those statutes previously has been thought to be "beyond doubt," *Griswold v. Connecticut*, 381 U.S. 479, 498 (Goldberg, J. concurring), and recent decisions from the lower courts have held that the statutes are, in fact, constitutional. *See, e.g., Henry*, 928 S.W.2d at 471-472; *Marcum*, 308 F.3d at 642-643.

Furthermore, criminal prosecutions aside, the United States had no history whatsoever of *protecting* the right to engage in extramarital sex, at least until a few state appellate courts began in the 1990s to invalidate their sodomy statutes as violative of a state constitutional right to privacy.[21] This Court, in particular, has never recognized

[21] The handful of state appellate courts that have invalidated sodomy or homosexual conduct statutes have all predicated their holdings upon objective indications that their state constitutions provided more privacy protection than the Federal Constitution. *See Commonwealth v. Wasson*, 842 S.W.2d 487, 492 (Ky. 1992) (basing its ruling upon the "textual and structural differences between the United States Bill of Rights and our own, which suggest a different conclusion from that reached by the United States Supreme Court is more appropriate"); *Campbell v. Sundquist*, 926 S.W.2d 250, 261 (Tenn. Ct. App. 1996) (noting that both the "Tennessee Constitution and this State's constitutional jurisprudence establish that the right to privacy provided to Tennesseans under our Constitution is in fact more

(Continued on following page)

any right to engage in extramarital sexual conduct, and it is telling that most of the fundamental liberty interests the Court has recognized under the Fourteenth Amendment are rooted in marriage, procreation and childrearing. An asserted right to engage in homosexual sodomy is actually inimical to the fundamental rights that this Court has endeavored to protect.

The Court catalogued the liberty interests to which it has accorded Fourteenth Amendment protection in *Glucksberg*, 521 U.S. at 720, as follows:

> In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy,

extensive than the corresponding right to privacy provided by the Federal Constitution"); *Gryczan v. State*, 942 P.2d 112, 121-22 (Mont. 1997) (invalidating a statute prohibiting "deviate sexual conduct" and noting that "Montana's Constitution affords citizens broader protection of their right to privacy than does the federal constitution"); *Powell v. State*, 510 S.E.2d 18, 22 (Ga. 1998) (in which a general sodomy statute was invalidated upon a finding that the " 'right to be let alone' guaranteed by the Georgia Constitution is far more extensive than the right of privacy protected by the U.S. Constitution"); *Jegley v. Picado*, 80 S.W.3d 332, 344 (Ark. 2002) (stating that "Arkansas's Constitution can be held to provide greater privacy rights than the United States Constitution").

The fact that five state courts have invalidated sodomy statutes in the last eleven years, on state constitutional grounds, is meager evidence of a deeply rooted national tradition of protecting the privacy of the conduct in issue. Too few states have taken such a step, over too brief a period of time, to support any such inference.

> *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *ibid.*; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion, *Casey*, *supra*. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan*, 497 U.S., at 278-279.

The conduct at issue in this case has nothing to do with marriage or conception or parenthood and it is not on a par with those sacred choices. Homosexual sodomy cannot occur within or lead to a marital relationship. It has nothing to do with families or children. The decision to engage in homosexual acts is not like the acts and decisions that this Court previously has found worthy of constitutional protection, and it should not be added to the list of fundamental rights protected by the Fourteenth Amendment.

The difference between protected conduct within the marriage relationship and unprotected sexual conduct outside marriage has been recognized on a number of occasions, most famously in Justice Harlan's dissenting opinion in *Poe v. Ullman*, 367 U.S. 497, 545-546, 552-553 (1961), in which he expressed the view that "any Constitutional doctrine in this area" must be built upon the division between acts occurring within and without the marital relationship:

> Yet the very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it

> necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis. . . .
>
> The right of privacy most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced. So much has been explicitly recognized in acknowledging the State's rightful concern for its people's moral welfare. *See* 367 U.S. at pages 545-548, *supra*. But not to discriminate between what is involved in this case and either the traditional offenses against good morals or crimes which, though they may be committed anywhere, happen to have been committed or concealed in the home, would entirely misconceive the argument that is being made.
>
> Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes

to regulate by means of the criminal law the details of that intimacy.

As noted in a concurring opinion in *Glucksberg*, Justice Harlan's proposed dichotomy "provides a lesson for today," in that his identification of the traditionally protected liberty interest in *Poe v. Ullman* served to distinguish "between areas in which government traditionally had regulated (sexual relations outside of marriage) and those in which it had not (private marital intimacies) and thus was broad enough to cover the claim at hand without being so broad as to be shot-through by exceptions." 521 U.S. at 770-772 (Souter, J., concurring).

Therefore, should the Court consider expanding the level of specificity with which it identifies the proposed liberty interest at issue in this case, the State urges the Court to draw the line at the threshold of the marital bedroom, in keeping with its past decisions emphasizing the American tradition of marital privacy. Outside that threshold, nothing in our nation's "history, legal traditions, and practices" offer the "crucial 'guideposts for responsible decisionmaking' . . . that direct and restrain [the Court's] exposition of the Due Process Clause." *Glucksberg*, 521 U.S. at 721 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

E. Principles of stare decisis counsel against recognition of a new protected liberty interest.

Stare decisis mandates that the Court adhere to its holdings in *Bowers*. Seventeen years should be considered a very brief period indeed, in the context of the development of fundamental rights under the Fourteenth Amendment, and the principle of stare decisis counsels against rapid change in this area. If a right is truly fundamental, its public acceptance and societal value should not be the subject of vehement and widespread disagreement. Fundamental rights should be rock solid, and vacillation is

inconsistent with the level of durability of rights which should be deemed "fundamental" to our society.

"Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). The petitioners argue that such special justification exists in the steady "erosion" of support for *Bowers* and the concomitant advancement of the gay rights movement, Brief of Petitioners 30-31, but the Court reaffirmed in *Glucksberg* that *Bowers* utilized the correct mode of analysis in the determination of the existence of a new liberty interest under the Fourteenth Amendment. The fact that a few more states have eased criminal sanctions on sodomy or homosexual conduct since 1986 does not logically affect the validity of the conclusion in *Bowers* that no right to engage in homosexual conduct can be found "deeply rooted in this Nation's history and tradition." *Bowers*, 478 U.S. at 192.

"It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The principle of federalism that encourages the state to undertake such experiments also operates to permit states to decline to participate in them. All change is not for the better, and the right to be first should be accompanied by a right to be among the last to accept a change of debatable social value.

In *Atkins*, the State of Texas found itself in a minority of states which had not legislatively limited its capital punishment statutes in a particular fashion, and it was obligated to join the herd because of the Eighth Amendment requirement that it comply with "evolving standards" of "contemporary values." 122 S.Ct. at 2247. This is not an Eighth Amendment case, and any indicia of recent "evolving standards" is irrelevant to the identification of those truly fundamental rights which form the core of our

democratic society. Courts cannot concern themselves "with cultural trends and political movements" without "usurping the role of the Legislature," and while the Legislature "may not be infallible in its moral and ethical judgments, it alone is constitutionally empowered to decide which evils it will restrain when enacting laws for the public good." *Lawrence*, 41 S.W.2d at 362.

For these reasons, this Court should reject the petitioners' due process challenge and affirm the judgment of the court below.

II. Equal Protection Under the Fourteenth Amendment.

The petitioners also argue that their prosecution for engaging in homosexual conduct violates the Equal Protection Clause of the Fourteenth Amendment. They argue that section 21.06 improperly criminalizes sexual conduct with a person of the same sex that is otherwise legal when done with a person of the opposite sex, and they claim that the State cannot articulate any rational basis for this classification.

This challenge fails on two grounds. First, given the evolution of the Texas sodomy statute towards more liberality with respect to sexual activity, petitioners cannot establish that the Texas Legislature purposefully discriminated against persons engaging in homosexual conduct. Instead, this Court reasonably can infer that the legislature, in good faith, incrementally narrowed the State's neutral proscriptions against sodomy in accordance with contemporaneous developments in due process jurisprudence. As such, instead of being the product of a legislative choice to discriminate against homosexuals, section 21.06 is the vestigial remainder of a predecessor sodomy statute, reduced to its present form as a result of the legislature's 1973 reform of the Texas Penal Code.

Second, this Court can infer a rational basis for the legislature's enactment of section 21.06. The State of Texas

has a legitimate state interest in legislatively expressing the long-standing moral traditions of the State against homosexual conduct, and in discouraging its citizens – whether they be homosexual, bisexual or heterosexual – from choosing to engage in what is still perceived to be immoral conduct. Section 21.06 rationally furthers that goal by publishing the State's moral disapproval in a penal code of conduct for its citizens and by creating a disincentive against the conduct. The Legislature reasonably could have concluded that lesser, unenforceable expressions of disapproval would be ineffective to deter that conduct. Moreover, the narrowing of the predecessor sodomy statute to avoid constitutional challenge is in itself a rational basis for the legislative action: viewed in historical context, the Texas Legislature's decision was a reasonable response to the evolving due process jurisprudence of the late 1960s and early 1970s.

This rational-basis analysis is consistent with this Court's analysis in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which addressed the rationality of basing legislation on moral tradition. Although *Bowers* was decided on substantive due process grounds, it stands alone as the only modern case in which this Court has approved moral tradition as a submitted rational basis for legislation. Nothing has changed in the sixteen years since *Bowers* to justify abandonment of its conclusion.[22]

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[22] As discussed in more detail *infra*, *Romer v. Evans*, 517 U.S. 620 (1996), does not dictate otherwise. Instead, *Romer* is notable for what it does *not* do: in striking down a constitutional amendment remarkably overbroad for the purposes it purported to further, the majority's opinion pointedly neither revisited the rationality of moral classifications in legislation nor distinguished *Bowers*.

A. The Equal Protection Clause – standard of review.

The Equal Protection Clause of the Fourteenth Amendment creates no substantive rights. *Vacco v. Quill*, 521 U.S. 793, 799 (1997). Instead, it "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." *Id.*; *see also City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (construing Equal Protection Clause as "essentially a direction that all persons similarly situated should be treated alike").

Unless a classification warrants some form of heightened review because it jeopardizes the exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

1. Rational-basis review.

Rational-basis review is "the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *City of Dallas v. Stanglin,* 490 U.S. 19, 26 (1989). "In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger*, 505 U.S. at 11 (citations omitted); *see also Romer,* 517 U.S. at 632 (1996) ("In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.")

The rational-basis standard of review is a paradigm of judicial restraint. *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993). Rational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices, nor does it authorize the judiciary to sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993). The Court summarized the evidentiary presumptions in rational-basis review in *Heller* as follows:

> [A] legislature that creates these categories need not "actually articulate at any time the purpose or rationale supporting its classification." Instead, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."
>
> A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." A statute is presumed constitutional, and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," whether or not the basis has a foundation in the record.

Id. at 320-21 (citations omitted).

When social legislation is at issue, the Equal Protection Clause allows the states wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes. *Cleburne*, 473 U.S. at 440; *see also Dandridge v. Williams*, 397 U.S. 471, 486 (1970) (holding that the rational basis standard "is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose

upon the States their views of what constitutes wise economic or social policy").

2. Heightened review is neither sought nor required.

The petitioners suggest only in a footnote that laws which incorporate a sexual-orientation-based classification, or a gender-based classification to discriminate against homosexuals, should be reviewed pursuant to a heightened scrutiny standard. Brief of Petitioners 32 n.24. This assertion is not implicated by the litigation, briefed by the petitioners, or mandated by law.

The petitioners do not brief their request for heightened review and continue to rely solely on the rational-basis standard of review in their equal protection challenge to the constitutionality of section 21.06. *See Lawrence,* 41 S.W.2d at 378 (Anderson, J., dissenting) (in response to majority's conclusions that there is no fundamental right to engage in sodomy, and homosexuals do not constitute a suspect class, dissent characterizes these conclusions as "irrelevant here because *appellants do not raise these arguments*") (emphasis added). Accordingly, this Court's jurisprudence would be ill-served by consideration of a new standard not actually in controversy between the parties. *See Heller*, 509 U.S. at 319 ("Even if respondents were correct that heightened scrutiny applies, it would be inappropriate for us to apply that standard here. Both parties have been litigating this case for years on the theory of rational-basis review, which . . . does not require the State to place any evidence in the record, let alone the extensive evidentiary showing that would be required for these statutes to survive heightened scrutiny. It would be imprudent and unfair to inject a new standard at this stage in the litigation.").

The appropriateness of applying a rational-basis analysis to classifications based upon sexual orientation is not a matter of controversy in this Court or the federal

courts of appeals. In *Romer v. Evans*, 517 U.S. 620 (1996), a case in which the amendment in question specifically classified the affected individuals in terms of sexual orientation, this Court nonetheless utilized the rational-basis test. *Id.* at 631-636. Likewise, in the federal courts of appeals, the profusion of litigation involving the exclusion of homosexuals from military service has provided ample opportunity for consideration of the appropriate standard of review, and it appears that those courts are unanimous in finding that homosexuals do not constitute a suspect class and that there is no fundamental right to engage in homosexual conduct.[23]

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[23] *See, e.g., Thomasson v. Perry,* 80 F.3d 915, 928 (4th Cir.), *cert. denied*, 519 U.S. 948 (1996) ("rational basis is . . . the suitable standard for review" of the military "don't ask/don't tell" policy); *Baker v. Wade,* 769 F.2d 289, 292 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986) ("the standard for review is whether § 21.06 [of the Texas Penal Code] is rationally related to a legitimate state end"); *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati,* 128 F.3d 289, 292-293 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998) (holding that city charter amendment pertaining to sexual orientation was subject to review "under the most common and least rigorous equal protection norm . . . the 'rational relationship' test"); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990) ("deferential standard of review" held applicable to military regulation targeting homosexuals).

See also Richenberg v. Perry, 97 F.3d 256, 260 (8th Cir. 1996), *cert. denied sub nom. Richenberg v. Cohen*, 522 U.S. 807 (1997) (rejecting contention that homosexuality is "suspect classification" requiring heightened scrutiny); *Holmes v. California Army National Guard*, 124 F.3d 1126, 1132 (9th Cir. 1997), *cert. denied*, 525 U.S. 1067 (1998) ("because homosexuals do not constitute a suspect or quasi-suspect class," the military "don't ask/don't tell" policy is subject only "to rational basis review"); *Rich v. Secretary of the Army,* 735 F.2d 1220, 1229 (10th Cir. 1984) ("classification based on one's choice of sexual partners is not suspect"); *Steffan v. Perry,* 41 F.3d 677, 684, n.3 (D.C. Cir. 1994) (holding that a group "defined by reference" to homosexual conduct "cannot constitute a suspect class"); *Woodward v. United States,* 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990)

(Continued on following page)

Heightened review of section 21.06 as a statute discriminating on the basis of gender is likewise unnecessary. This Court's heightened scrutiny in gender cases has been directed at legislative classifications that "create or perpetuate the legal, social, and economic inferiority of women." *United States v. Virginia*, 518 U.S. 515, 534 (1996). Such heightened scrutiny has been mandated

> in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of "archaic and overbroad" generalizations about gender, *see Schlesinger v. Ballard*, 419 U.S. 498, 506-507 (1975), or based on "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas.'" *Craig v. Boren*, 429 U.S. 190, 198-199 (1976). See also *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441 (1985) (differential treatment of the sexes "very likely reflect[s] outmoded notions of the relative capabilities of men and women").

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 135 (1994); *see also United States v. Virginia*, 518 U.S. at 532 (stating that the Court will "carefully inspect[ ] official action that closes a door or denies opportunity to women (or to men)").

Enforcement of section 21.06 does not involve gender stereotyping or exclusion. The homosexual conduct statute indulges in no stereotypes about the respective capabilities of men and women, and it does not penalize one gender at the expense of the other. *See Miller v. Albright*, 523 U.S. 420, 444-45 (1998) (rejecting claim of improper gender-based classification in Fifth Amendment equal protection analysis of statute because "[n]one of the premises on which the statutory classification is grounded can be fairly

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(holding that a homosexual "is not a member of a class to which heightened scrutiny must be afforded").

characterized as an accidental byproduct of a traditional way of thinking about the members of either sex"); *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997) (holding that, while California's Proposition 209 mentions race and gender, it does not logically classify persons by race and gender).

Given these circumstances, heightened review for statutes that classify on the basis of sexual orientation or gender is neither raised nor required in this case.

B. The petitioners have not established their membership in the class for which equal protection relief is sought.

Before rational-basis review is necessary, the petitioners must establish that Texas impermissibly discriminated against *them*. From the record and the briefs, however, it is unclear what class the petitioners purport to represent in this challenge.

The classifications challenged in the petitioners' respective motions to quash the complaints against them in the trial court were the criminalization of "consensual sexual acts, including those in private, according to the sex and sexual orientation of those who engage in them," and the "discriminatory classification against gay people." *See* Pet. App. 119a-120a, 131a-132a. However, the record is silent as to the sexual orientation of the petitioners and whether the charged conduct was occurring consensually. *See id.*, Appendices E, F & G, pp. 107a-141a (entirety of trial court record).

In *United States v. Hays*, 515 U.S. 737 (1995), the Court summarized the elements necessary to establish standing:

> First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection

> between the injury and the conduct complained of . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 742-743 (1995). The Court emphasized that, to avoid dismissal on standing grounds, the party who seeks the exercise of jurisdiction in his favor must clearly allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute, and thereafter support this allegation by evidence adduced at trial. *Id.* at 743.

In this instance, if the petitioners contend that they were denied equal protection because they belong to the class of individuals who are foreclosed from having deviate sexual intercourse with another person of the same sex, they do not state an equal protection violation. Under the facially neutral conduct prohibitions of section 21.06, everyone in Texas is foreclosed from having deviate sexual intercourse with another person of the same sex. If the petitioners contend, however, that they were denied equal protection because they belong to a class of individuals who have been disproportionately impacted by section 21.06, the record is silent as to whether they in fact belong to such a class.

This Court accords equal protection standing only to "those persons who are personally denied equal treatment." *See id.* at 743-744 (quoting *Allen v. Wright*, 468 U.S. 737, 755 (1984). While the petitioners clearly have been prosecuted under section 21.06, it is not established in this record that they possess the same-sex orientation that they contend is singled out for discrimination by the statute.

As such, the writ of certiorari should be dismissed as improvidently granted, or standing should be denied to these petitioners for lack of an adequate record to establish an equal protection violation against them personally.

C. The Texas Legislature did not purposefully discriminate in the passage of section 21.06.

Although the petitioners assert that the "group targeted and harmed by the Homosexual Conduct Law is, of course, gay people," *see* Brief of Petitioners 33, and much of their briefing is related to the unequal protection of the laws with respect to homosexuals, *see id.* at 40-50, section 21.06 does not expressly classify its offenders on the basis of their sexual orientation. Rather, it criminalizes homosexual conduct without reference to a defendant's sexual orientation. *Lawrence*, 41 S.W.2d at 353; *see also* Editors of the Harvard Law Review, *Sexual Orientation and the Law*, at 16 (Harvard University Press 1990) ("Although litigants and courts have assumed that [same-sex] sodomy statutes classify based on sexual preference, the statutes actually prevent all persons from engaging in same-sex sodomy, regardless of sexual orientation.").[24]

The focus of section 21.06 on conduct, rather than sexual orientation, does not foreclose equal protection review. A statute, though facially neutral, may still be challenged as constitutionally infirm under the Equal Protection Clause if the challenger can prove that the statute was enacted because of a discriminatory purpose. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979). This intent component is significant: equal protection jurisprudence focuses on the purposeful marginalization of disfavored groups. *See id.* at 274, 279

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[24] The authors of the Harvard Law Review treatise go on to assert, however, that an invidious classification can be inferred from the disparate impact of the statute. *Id.* As will be discussed herein, disparate impact is insufficient in itself to establish an equal protection classification. There must be purposeful invidious discrimination against the affected class, and a review of the historical context in which the Texas statute was enacted does not suggest the presence of such discrimination.

(holding that "discriminatory purpose" implies more than intent as volition or intent as awareness of the consequences; it implies that the decisionmaker [in that case a state legislature] selected or reaffirmed a particular course of action at least partly "because of," and not merely "in spite of," its adverse effects upon an identifiable group); *Hernandez v. New York*, 500 U.S. 352, 372-73 (1991) (O'Connor, J., concurring) ("An unwavering line of cases from this Court holds that a violation of the Equal Protection Clause requires state action motivated by discriminatory intent; the disproportionate effects of state action are not sufficient to establish such a violation.").

As such, assuming that petitioners appear as representatives of the class of individuals who are disproportionately affected by section 21.06, it is incumbent upon them to prove the purposeful intent of the Texas Legislature in order to perfect their equal protection claim. *Cf. State v. Baxley,* 656 So.2d 973, 978 (La. 1995) ("Given the presumption of the constitutionality of legislation which does not classify on its face, it is incumbent upon the challenger of the legislation to prove the discriminatory purpose. In the present case, the record is devoid of any evidence that the crime against nature statute was enacted for the purpose of discriminating against gay men and lesbians. Therefore, the statute is not constitutionally infirm on these grounds.").

The record on appeal – which essentially consists of complaints, "probable cause affidavits," motions to quash, and pleas of guilty – provides no such evidence. Likewise, the petitioners have submitted no evidence of the Legislature's intent to invidiously discriminate.

Although commentators have speculated that section 21.06 was enacted in its present form because of political concerns about the impact of decriminalizing homosexual conduct, an alternative interpretation of the Legislature's intent can be inferred from the historical context within which section 21.06 was passed.

In 1854, the State's Fifth Legislature determined that the conduct engaged in by the petitioners in this case – homosexual anal intercourse – should be punishable by hard labor in the penitentiary for up to five years:

> Sec. 40. If any person shall commit the abominable and detestable crime against nature, either with mankind or with any beast, he shall be punished by confinement to hard labor in the Penitentiary not exceeding five years.

Act of February 9, 1854, 5th Leg., R.S., ch. XLIX, § 40, 1854 Tex. Gen. Laws 58, 66.

Six years later, the Eighth Legislature increased both the minimum and maximum periods of confinement to be assessed upon conviction of that offense:

> Art. 399c. If any person shall commit with mankind or beast the abominable and detestable crime against nature, he shall be deemed guilty of sodomy, and on conviction thereof, he shall be punished by confinement in the penitentiary for not less than five nor more than fifteen years.

Act of February 11, 1860, 8th Leg., R.S., ch. 74, 1860 Tex. Gen. Laws 95, 97.

A Reconstruction-era Texas Supreme Court found the prohibition of the "abominable and detestable crime against nature" to be too vague to be enforced, *Fennell v. State,* 32 Tex. 378 (1869), but by 1893, the Court of Criminal Appeals was willing to look to the common law for guidance in determining what constituted a "crime against nature," and it found that the conduct prohibited by the statute was anal sexual intercourse. *See Prindle v. State,* 21 S.W. 360 (Tex. Crim. App. 1893).

In 1943, the statute was amended to the following form:

> **Article 524. Sodomy.**
>
> Whoever has carnal copulation with a beast, or in an opening of the body, except sexual parts, with another human being, or whoever shall use

> his mouth on the sexual parts of another human being for the purpose of having carnal copulation, or who shall voluntarily permit the use of his own sexual parts in a lewd and lascivious manner by any minor, shall be guilty of sodomy, and upon conviction thereof shall be deemed guilty of a felony, and shall be confined in the penitentiary not less than two (2) nor more than fifteen (15) years.

Act of April 5, 1943, 48th Leg., R.S., ch. 112, § 1, 1943 Tex. Gen. Laws 194 (hereinafter "article 524").

In 1965, this Court recognized in *Griswold v. Connecticut,* 381 U.S. 479 (1965), a constitutional right of privacy forbidding government regulation of a married couple's access to the use of contraceptives. Decisions followed that further delineated similar rights of privacy, including *Loving v. Virginia,* 388 U.S. 1 (1967), *Eisenstadt v. Baird,* 405 U.S. 438 (1972), and *Roe v. Wade,* 410 U.S. 113 (1973).[25]

As a result of those decisions, article 524 came under attack in federal district court, *see Buchanan v. Batchelor,* 308 F. Supp. 729 (N.D. Tex. 1970), *rev'd on other grounds,* 401 U.S. 989 (1971), and in the Texas Court of Criminal Appeals. *See Pruett v. State,* 463 S.W.2d 191 (Tex. Crim. App. 1971). The *Buchanan* court, a three-judge panel, declared article 524 unconstitutional because it violated the liberty of married couples in their private conduct by subjecting them to felony prosecution for private acts of sodomy, "an intimate relation of husband and wife." *Id.* at

[25] In fact, *Roe* was announced on January 23, 1973, just two weeks after the 63rd Texas Legislature convened on January 9, 1973, to enact the legislation that would ultimately include the 1974 Texas Penal Code. *See* 1973 Tex. Gen. Laws vi (noting date of convening as January 9, 1973).

732-33. The court declined to extend its holding to homosexual conduct, specifically noting the limited applicability of *Griswold* to the marital context. *Id.* at 733. The Court thus held article 524 unconstitutional "insofar as it reaches the private, consensual acts of married couples." *Id.* at 735.

Although *Buchanan* was later reversed by this Court and remanded for consideration as to whether abstention was necessary in light of the Court's decision in *Younger v. Harris,* 401 U.S. 37 (1971), and the Texas Court of Criminal Appeals ultimately declined to find article 524 unconstitutional in *Pruett,*[26] these cases were certainly within the constructive knowledge of the 1973 Texas Legislature as it considered what to do with the sodomy statute.

As such, it is a reasonable inference from this context that the Texas Legislature's enactment of section 21.06 in 1973 was not purposefully discriminatory against homosexuals, but was instead a reform of article 524 in accordance with what then appeared to be the direction in which constitutional privacy law was heading. The reformatory nature of the amendments is indicated as well by the Legislature's reduction of the offense from a felony punishable by confinement in the penitentiary for a minimum two years to a misdemeanor punishable only by a fine of up to two hundred dollars, and the Legislature's

[26] The reluctance of the Texas Court of Criminal Appeals to invalidate the sodomy statute in *Pruett* may have been related to the facts of the case. *Pruett* was essentially a homosexual rape case, in which the adult defendant "confessed that he committed the offense, after the victim had refused to consent, by striking him in the face with his fist and making him submit." *Pruett,* 463 S.W.2d at 192. The Court expressly noted that it had not been called upon to consider the "question of whether the sodomy statute may be invoked against married couples for private consenual [sic] acts." *Id.* at 194.

formulation of the statute to forbid only certain kinds of homosexual conduct.[27]

The residual differences left over from this kind of benign incremental reform do not amount to purposeful discrimination.[28] *See, e.g., McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 809 (1969) ("[A] legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.") (citations omitted); *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 316 (1993) ("[S]cope-of-coverage provisions are unavoidable components of most economic or social legislation. [The necessity of drawing a line of demarcation] renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally.").

Because there is no evidence establishing that the Texas Legislature acted with discriminatory intent in 1973, the presumption of constitutionality persists. The

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[27] For example, the homosexual conduct statute does not forbid kissing or sexual stimulation of another person of the same sex with hands or fingers. *See Baker v. Wade*, 553 F. Supp. 1121, 1134 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986).

[28] The Texas Legislature reenacted the Texas Penal Code in 1993, leaving section 21.06 intact. Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 1.01, 1993 Tex. Gen. Laws 3589. As was the case in 1973, this reenactment of the status quo was also consistent with the then-prevailing law with respect to recognition of privacy for homosexuals. *See Bowers v. Hardwick*, 478 U.S. 186 (1986). An invidious intent cannot be inferred from the Legislature's passive maintenance of the status quo.

petitioners have not demonstrated purposeful discrimination against the class they purport to represent.

D. Section 21.06 is rationally related to a legitimate state interest.

If a rational-basis analysis is necessary with regard to the promulgation of section 21.06, the State's legitimate interest in protecting its statute from constitutional challenge was in itself a rational basis for legislative action. In addition, section 21.06 rationally furthers other legitimate state interests, namely, the continued expression of the State's long-standing moral disapproval of homosexual conduct, and the deterrence of such immoral sexual activity, particularly with regard to the contemplated conduct of heterosexuals and bisexuals.

1. Section 21.06 was enacted for the purpose of avoiding litigation and possible invalidation of the predecessor statute.

As noted above, section 21.06 was enacted by a 1973 Texas Legislature which was cognizant of changing judicial attitudes towards the constitutionality of legislation restricting private decisions of married couples. Accordingly, the decision to narrow article 524 was not the irrational product of invidious discrimination against homosexuals, but rather a reasonable retrenchment of the statute to address what may have been perceived to be a constitutional limitation of state authority to regulate marital behavior. No similar concerns existed at that time with respect to the possible constitutional protection of homosexual conduct, thus vitiating the need for immediate legislative reform in that direction.

For the reasons more fully expressed *supra*, this neutral motivation for the amendment of article 524 into the present-day statute – *i.e.*, to avoid a potentially successful challenge to the State's sodomy law by individuals

engaging in consensual heterosexual conduct – represents a rational basis for the classification of conduct upon which section 21.06 is based.

2. Section 21.06 furthers the legitimate governmental interest of promotion of morality.

The promotion of morality has long been recognized as a lawful function of government. *See, e.g., Barbier v. Connolly,* 113 U.S. 27, 31 (1884) (holding that the Equal Protection Clause was not intended "to interfere with the power of the state . . . to prescribe regulations to promote the health, peace, morals, education, and good order of the people"); *Louis K. Liggett Co. v. Baldridge,* 278 U.S. 105, 111-12 (1928) ("The police power may be exerted in the form of state legislation . . . only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare."); *Berman v. Parker,* 348 U.S. 26, 32 (1954) (identifying "[p]ublic safety, public health, morality, peace and quiet [and] law and order" as appropriate "application[s] of the police power to municipal affairs"); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (plurality opinion) (holding that police powers of the State extend to "public health, safety and morals").

Similarly, protection of family and morality has motivated many valid governmental actions. *See, e.g., Barnes*, 501 U.S. at 569 (recognizing legislature's right to "protect 'the social interest in order and morality'" in enacting public indecency statutes); *Michael H. v. Gerald D.*, 491 U.S. 110, 131 (1989) (protection of "integrity of the marital union" as legitimate state interest for denying third-party standing to challenge legitimacy of birth); *City of Dallas v. Stanglin*, 490 U.S. 19, 27 (1989) (protection of teenagers from "corrupting influences" as legitimate state interest for limiting access to dancehall); *Ginsberg v. United States,* 390 U.S. 629, 639 (1968) (approving legislature's legislation against distribution of "girlie magazines"

to minors because "legislature could properly conclude that parents and others . . . who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility").

This moral component was at the core of the Fifth Circuit's decision affirming the constitutionality of section 21.06 in 1985. Sitting *en banc,* that court found that "in view of the strong objection to homosexual conduct, which has prevailed in Western culture for the past seven centuries," section 21.06 was rationally related to the implementation of "morality, a permissible state goal," and, therefore, did not violate the Equal Protection Clause. *Baker v. Wade,* 769 F.2d 289, 292 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986). Other courts at that time reached similar conclusions. *See Dronenburg v. Zech,* 741 F.2d 1388, 1397 (D.C. Cir. 1984) (upholding naval regulations excluding homosexuals from service as a permissible implementation of public morality, and noting the unlikelihood that "very many laws exist whose ultimate justification does not rest upon the society's morality"); *State v. Walsh*, 713 S.W.2d 508, 511-12 (Mo. 1986) (holding that "punishing homosexual acts as a Class A misdemeanor . . . is rationally related to the State's constitutionally permissible objective of implementing and promoting the public morality").

Shortly before the courts in *Baker* and *Dronenburg* upheld legislation related to homosexual conduct, the Eleventh Circuit reached an opposite conclusion with respect to Georgia's sodomy statute. *See Hardwick v. Bowers*, 760 F.2d 1202, 1212 (11th Cir. 1985) (holding that the Georgia statute implicated Hardwick's fundamental rights because his homosexual activity was a private and intimate association placed beyond the reach of state regulation by the Ninth Amendment and the "notion of fundamental fairness embodied in the due process clause of the Fourteenth Amendment").

This Court granted the Georgia Attorney General's petition for certiorari, and declined to invalidate Georgia's

sodomy statute, finding that there was no fundamental right to engage in homosexual sodomy. *Bowers*, 478 U.S. at 191. In reaching this conclusion, the Court noted the long history of moral disapproval of homosexual conduct, noting that "[p]roscriptions against that conduct have ancient roots," and that, until 1961, sodomy had been illegal in all fifty states. *Id.* at 192; *see also id.* at 196-97 (Burger, C.J., concurring) (detailing historical genesis of sodomy statutes).

This Court dismissed Hardwick's assertion that there was no rational basis for the Georgia sodomy statute, explicitly rejecting the notion that laws may not be based upon perceptions of morality:

> Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.

Id. at 196. This Court shortly thereafter declined to review the constitutionality of section 21.06 of the Texas Penal Code. *See Baker v. Wade*, 478 U.S. 1022 (1986) (denying petition for writ of certiorari).

Nothing in this Court's jurisprudence since *Bowers* justifies revisiting its conclusion that morality constitutes an appropriate basis for legislative action. Petitioners cite *Romer v. Evans*, 517 U.S. 620 (1996) as antithetical to

Bowers, but a careful review of *Romer* indicates that its application of equal protection principles to an overbroad state constitutional amendment does not implicate the legislature's authority to prohibit what has traditionally been perceived as immoral conduct.

In *Romer*, the citizens of the State of Colorado approved a constitutional amendment that invalidated municipal ordinances banning discrimination on the basis of sexual orientation, and prohibited all legislative, executive or judicial action at any level of state or local government designed to protect homosexuals, lesbians, or bisexuals. *See id.* at 627. The Court summarized the impact of the amendment:

> Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.

Id.

In overturning the amendment on equal protection grounds, the Court found that the statute "has the peculiar property of imposing a broad and undifferentiated disability on a single named group" that is "at once too narrow and too broad," identifying "persons by a single trait and then den[ying] them protection across the board." *Id.* at 632-33. In other words, the Colorado initiative was held unconstitutional because it went beyond punishment of the act of engaging in homosexual conduct and sought to disenfranchise individuals because of the mere tendency or predilection to engage in such conduct.

Section 21.06 does not suffer from that flaw. It is the homosexual conduct that is viewed as immoral, and a statute rendering that conduct illegal is obviously related to the goal of discouraging the conduct and thereby implementing morality. A statute that, say, prohibited all

individuals with a homosexual orientation from attending public schools would not be rationally related to that goal and would violate the Equal Protection Clause, but a statute imposing criminal liability only upon persons who actually engage in homosexual conduct is perfectly tailored to implement the communal belief that the conduct is wrong and should be discouraged.

Notably, the issue of morality as a rational basis for the amendment was not implicated in *Romer*.[29] The lawyers challenging Amendment 2 did not ask this Court to overrule *Bowers*, and the lawyers for the State of Colorado avoided relying on it in their arguments. *Romer*, 517 U.S. at 635 (identifying primary rationale for Amendment 2 as "respect for other citizens' freedom of association" and Colorado's "interest in conserving resources to fight discrimination against other groups"); 517 U.S. at 641 (Scalia, J., dissenting) ("Respondents' briefs did not urge overruling *Bowers*, and at oral argument respondents' counsel expressly disavowed any intent to seek such overruling."); *see generally* Thomas C. Grey, *Bowers v. Hardwick Diminished*, 68 U. Colo. L. Rev. 373, 375 & notes 13-14 (1997) (discussing general absence of advocacy related to *Bowers* in the *Romer* litigation).

In the absence of any party raising morality as a justification, the *Romer* court prudentially declined to raise the issue itself. As the court below observed:

[29] The Colorado constitutional amendment, which one commentator characterized as a "squirrelly antigay initiative adopted by narrow margins in an outlier state," *see* William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 229 (1999), lent itself to a holding that bypassed the role of morality in legislation. *See also* Lynn A. Baker, *The Missing Pages of the Majority Opinion in Romer v. Evans*, 68 U. Colo. L. Rev. 387, 408 (1997) (arguing that *Romer* is generally limited to its facts because "it is Amendment 2's unjustifiable and unprecedented scope, [its] 'sheer breadth,' that distinguishes it" from other legislation).

> *Romer* . . . does not disavow the Court's previous holding in *Bowers*; it does not elevate homosexuals to a suspect class; it does not suggest that statutes prohibiting homosexual conduct violate the Equal Protection Clause; and it does not challenge the concept that the preservation and protection of morality is a legitimate state interest.

Lawrence, 41 S.W.3d at 355. As such, *Romer* does not contradict the ultimate conclusion in *Bowers* – that majoritarian moral standards can be a rational basis for prohibitions against certain homosexual conduct.

The State does not dispute that invidious intent can be inferred from classifications based on race, gender, economic status, or mental retardation. *See, e.g., Palmore v. Sidoti,* 466 U.S. 429 (1984) (reversing order denying custody based on racial considerations); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (reversing gender-based classification in distribution of military benefits); *United States Department of Agriculture v. Moreno,* 413 U.S. 528 (1973) (striking down grossly overbroad classification discriminating against "individuals who live in households containing one or more members who are unrelated to the rest"); *Cleburne,* 473 U.S. 432 (1985) (striking down zoning restriction against group home for mentally retarded based on negative reactions of neighbors to proximity). In those cases, the Court fairly reduced the asserted bases for discriminatory classifications to unsubstantiated negative views about the affected individuals. *See Romer*, 517 U.S. at 635 (prohibiting "status-based" legislation that is "a classification of persons undertaken for its own sake").

Those classifications do not implicate a moral component, though, as does a classification identifying types of homosexual conduct. As previously noted, the history of prohibitions against homosexual sodomy – in the common

law, American law, and Texas law – is ancient, and the legislature's deference to these moral traditions is appropriate and rational.[30]

The prohibition of homosexual conduct in section 21.06 represents the reasoned judgment of the Texas Legislature that such conduct is immoral and should be deterred.[31] Although the application of sodomy statutes is not common because of the nature and circumstances of the offense, the statutes, like many others, express a baseline standard expressing the core moral beliefs of the people of the State. Whether this Court perceives this position to be wise or unwise, long-established principles of federalism dictate that the Court defer to the Texas Legislature's judgment and to the collective good sense of the people of the State of Texas, in their effort to enforce public morality and promote family values through the promulgation of penal statutes such as section 21.06.

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[30] *See* Michael McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 Yale L. Rev. 1501 (1989), arguing that deference to traditions of morality is "natural and inevitable . . . but it is also *sensible*":

> An individual has only his own, necessarily limited, intelligence and experience (personal and vicarious) to draw upon. Tradition, by contrast, is composed of the cumulative thoughts and experiences of thousands of individuals over an expanse of time, each of them making incremental and experimental alterations (often unconsciously), which are then adopted or rejected (again, often unconsciously) on the basis of experience – the experience, that is, of whether they advance the good life.

[31] In fact, although the statute is unlikely to deter many individuals with an exclusively homosexual orientation, the Legislature rationally could have concluded that section 21.06 would be effective to some degree in deterring the remaining population (i.e., persons with a heterosexual or bisexual orientation) from detrimentally experimenting in homosexual conduct.

III. Summary.

Public opinion regarding moral issues may change over time, but what has not changed is the understanding that government may require adherence to certain widely accepted moral standards and sanction deviation from those standards, so long as it does not interfere with constitutionally protected liberties. The legislature exists so that laws can be repealed or modified to match prevailing views regarding what is right and wrong, and so that the citizens' elected representatives can fine-tune the severity of the penalties to be attached to wrongful conduct. Perhaps homosexual conduct is not now universally regarded with the same abhorrence it inspired at the time of the adoption of our Federal Constitution, but any lag in legislative response to a mere change of public opinion – if such a lag actually exists – cannot and must not constitute the basis for a finding that the legislature's original enactment exceeded its constitutional authority.

As stated in *Glucksberg*, 521 U.S. at 735-36, there is "an earnest and profound debate about the morality, legality and practicality" of the statute in question; and the affirmance of the decision of the court of appeals in this case will "permit this debate to continue, as it should in a democratic society."

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be dismissed as improvidently granted, or, in the alternative, that the judgment of the Texas Court of Appeals for the Fourteenth District should be in all things affirmed.

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